

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

**Creation of a Low Power
Radio Service**

MM Docket No.: 99-25

TO: The Commission

**JOINT REPLY COMMENTS OF GALAXY COMMUNICATIONS, L.P. AND DESERT
WEST AIR RANCHERS CORPORATION**

**Galaxy Communications, L.P.
Desert West Air Ranchers Corporation**

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Galaxy Communications, L.P. and Desert West Air Ranchers Corporation (together, the “*Joint Commenters*”), hereby submit their joint reply comments (“Reply”) to the Commission’s *Second Order on Reconsideration and Further Notice of Proposed Rulemaking* in MM Docket No. 99-25, FCC 05-75 (released March 17, 2005) (“*FNPRM*”), in the above-captioned proceeding.

I. Introduction

The *FNPRM* sought comment on several proposed changes to the rules governing the ownership and technical requirements for the Low Power FM (“LPFM”) service. Of these proposed changes, most notable were the elevation of LPFM stations to primary status in relation to FM translators and the elimination of minimum spacing requirements for second- and third-adjacent channel full-power stations under Section 73.809.¹ Numerous comments filed in response to the *FNPRM*, including those of the Joint Commenters, expressed grave concern over

¹ LPFM stations must, under the current rule regime, resolve allegations of actual interference to the reception of co- first-, second-, and third-adjacent channel full-power stations within the full-service station’s 70 dBu contour. *See* 47 C.F.R. §73.809(a)(1); *see also* *FNPRM* at ¶37.

the potential deleterious effects to the full-power FM service that would result from adoption of these proposed changes and provided supporting evidence of the crucial role of FM translators in the full-power service.² LPFM advocates' comments, however, endorsed the further expansion of the service and suggested the enactment of new protective measures to prevent "encroachment" on LPFM stations by full-power stations and to strictly limit the grant of FM translator applications.³ Below, the Joint Commenters respond to these proposals and

² See e.g., Joint Comments of Galaxy Communications, L.P. and Desert West Air Ranchers Corporation, MM Docket No. 99-25, filed August 22, 2005 ("Joint Commenters"); Comments of National Association of Broadcasters ("NAB"), MM Docket No. 99-25, filed August 22, 2005; Comments of Educational Media Foundation ("EMF"), MM Docket No. 99-25, filed August 22, 2005; Comments of National Public Radio ("NPR"), MM Docket No. 99-25, filed August 22, 2005; Comments of Named State Broadcasters Associations, MM Docket No. 99-25, filed August 22, 2005.

³ See e.g., Comments of Prometheus Radio Project et al., MM Docket No. 99-25, filed August 22, 2005 [hereinafter, "Prometheus Comments"]. Many individuals filed identical supporting comments for the LPFM service in this proceeding; hereinafter, their comments shall be referred to as "Comments of LPFM Supporters." The Joint Commenters note that a substantial number of the thousands of such supporting comments (and possibly even the majority) were essentially identical and appeared to have been generated through the convenience of cut-and-paste/click-and-send technology available through computers and the Internet. The Joint Commenters do not wish to suggest that any of these cookie cutter comments can or should be ignored simply because of their purely duplicative, robotic nature. We may presume for the sake of argument that each separate party submitting such a "comment" really did intend to express his/her/its true feelings about the subject matter – even if those true feelings were expressed in a "comment" consisting solely of a word-for-word parroting of a thousand other identically-expressed "comments" containing no factual presentation or conceptual argument that might distinguish any of them from any others or warrant any particular attention by the Commission.

While these thousands of cloned robo-comments may be entitled to some consideration, the Joint Commenters caution the Commission not to accord any great significance to their mere volume. In this day and age of computerized, on-line communication, it is child's play to generate such volume, as the Commission has experienced in, e.g., the myriad submissions in the broadcast multiple ownership proceeding or the reaction to the Janet Jackson/Super Bowl incident in 2004. But the loudness of a message does not enhance or detract from the message's actual, substantive content. So the fact that 10,000 individual messages may urge that up is down does not make it so. Conversely, where the truth is spoken by only one person (e.g., Copernicus) who is contradicted by everyone else, the truth is nevertheless the truth.

And lest the Commission be impressed (favorably or otherwise) by the sheer numbers of repetitive comments filed in this proceeding, the Joint Commenters note that those numbers

demonstrate their inconsistency with the fundamental principles of spectrum efficiency and fairness.

II. Discussion

A. **To grant LPFM stations co-equal, primary status with full-power stations or to impose processing guidelines on applications for modification of full-power stations that give preference to LPFM stations would be inconsistent with Section 307(b) of the Communications Act**

The Prometheus Comments and the Comments of LPFM supporters propose a radical change in the relationship between LPFM stations and full-power stations, which they characterize as a remedy to the broadcast industry's alleged lack of diversity and low quality of service. Their comments, however, provide no evidence to support this contention. Moreover, the proffered solutions are simply unacceptable under the requirements of the Section 307(b) of the Communications Act ("Section 307(b)"), which requires the "fair, efficient, and equitable distribution of radio service to [states and communities]."⁴

The Prometheus Comments recommend that the Commission give LPFM stations co-equal, primary status with respect to full-power stations.⁵ To extend the same mutual interference protection standards currently required of full-power stations to LPFM stations would not only give rise to new technical considerations and expenses for *both* full-power and LPFM stations, it would also engender a sub-standard class of primary stations. A full-power station, regardless of class, naturally makes more efficient use of the spectrum than any LPFM station operating on the same channel ever would, simply by virtue of its authorization to transmit a stronger signal, thereby reaching a wider area of coverage. The efficiency

could have been increased exponentially – in favor of full-service stations over LPFM's – had full-service licensees solicited such comments from their millions of long-time listeners.

⁴ 47 U.S.C. §307(b).

⁵ See Prometheus Comments at 13.

considerations demanded by Section 307(b) do not preclude, obviously, the existence of an LPFM service that serves communities locally, but they do mandate that priority be given to full-power stations.

The Prometheus Comments also propose the adoption of a processing guideline, to be used in the evaluation of an application for a new full-power construction permit or the modification of an existing full-power station. Prometheus would require the Commission to dismiss any such application that “eliminate[s] or seriously degrade[s] the LPFM listening area” as contrary to the public interest.⁶ The effect of such a guideline would be to grant *de facto* primary status to existing LPFM stations with respect to these applications, as the Commission definitively stated in the FNPRM.⁷ The Prometheus Comments’ description of such a guideline as a “self-executing mechanism...that creates a licensing safe harbor for any station that meets its guidelines” is merely an exercise in Newspeak, an attempt to create the impression that the proposed rule somehow favors full-power stations. But even if you dress it up and put lipstick on it, a pig is still a pig. Here, any requirement that forces a full-power applicant to demonstrate the benefit of its application in relation to an existing LPFM station, through adversarial procedures before the Commission, does in fact place the LPFM service above full-power service in the hierarchy of FM services. Such a fundamental inversion of priorities contravenes Congress’s insistence on the *efficient* use of spectrum under Section 307(b). Unless and until Congress amends the Communications Act to direct the Commission to maximize the *inefficient* use of spectrum, the Prometheus proposal must be rejected.

B. A continued freeze on the processing of FM translator applications as a corrective measure for alleged abuses is inequitable and therefore, inconsistent with Section 307(b) of the Communications Act

⁶ See Prometheus Comments at 14.

⁷ See FNPRM at ¶38.

Prometheus, by a motion filed in the above-captioned proceeding on September 15, 2005, proposed an extension of the six-month freeze on the granting of new FM translator construction permits, ordered *sua sponte* by the Commission in the FNPRM. The Commission has to date announced no action on that motion, and the freeze thus expired on September 17, 2005. The Joint Commenters now urge the Commission to deny the Prometheus motion because it is contrary to the public interest and, moreover, it is an inequitable remedy for the alleged abuse of procedures engaged in by a small minority of FM translator applicants.

Fill-in FM translators provide an essential, local service and are integral to the service of the full-power stations whose signal they receive and retransmit. As the Commission has noted, and as was emphasized in the Comments of NAB, Comments of NPR and those of the Joint Commenters, they are crucial in ensuring that a full-power station serves the population within its entire protected, primary service contour in situations where terrain or topographical obstructions are impediments to service.⁸ Applications for new permits to construct these services are rarely, if ever, filed in numerous quantities, as their intent is merely to fill in a hole. They are not used to build so-called “gigantic radio empires”⁹ by manipulation of the Commission’s rules. To continue to hold applications, filed in good faith to maintain the service of full-power stations, hostage to the lengthy investigations into potential speculation, as well as the other procedural and policy matters raised in this proceeding, is not equitable. Such action essentially treats all new FM translator applications as suspect, without any adjudication on the merits or substance of the applications. At a minimum, the action must be justified by factors such as legitimate public need and supporting evidence. The Commission stated in the FNPRM

⁸ See Comments of Joint Commenters at 4; *see also* Comments of NAB at 27 and Comments of NPR at 5.

⁹ Prometheus Comments, Appendix B.

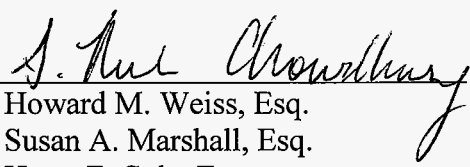
that the precise extent of the preclusive effect of the 2003 FM translator filing window on LPFM licensing is impossible to determine.¹⁰ The Prometheus Comments provide no conclusive data to support their Motion. Without demonstrated need, a continued freeze violates the plain language of Section 307(b) of the Communications Act.

III. Conclusion

From the commencement of this proceeding, the Commission has repeatedly expressed its determination to preserve the integrity of the existing FM service. It is vital that the Commission remain mindful of this pledge and take no steps to improve the LPFM service which would come at the cost of diminishing the reach and functioning of full-power FM stations and the FM translators that support their broadcast. The Joint Commenters respectfully request the Commission's consideration of the foregoing matters.

Respectfully submitted,

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¹⁰ See FNPRM at ¶ 31.